

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
October Term, 1977

HUNTINGTON TOWERS, LTD. and
RICHARD CAREY,

Petitioners,

v.

FEDERAL RESERVE BANK OF NEW YORK, EUROPEAN-
AMERICAN BANK and JAMES SMITH, individually and as
Comptroller of the Currency,

77-564

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

**EUROPEAN-AMERICAN'S BRIEF IN OPPOSITION
TO THE PETITION FOR CERTIORARI**

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Of Counsel

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The only issue concerning Respondent European-American Bank & Trust Company ("European-American") raised by the petition for certiorari is whether plaintiffs, petitioners here, can avoid the New York statute of frauds, N.Y. GEN. OBLIG. LAW § 5-703(1) (McKinney 1964), in their effort to create an enforceable financing contract out of certain alleged oral representations ("Questions Presented" Nos. 5 and 6). The other issues raised by the petition, which relate to the insolvency of Franklin National Bank, do not involve European-American.

Plaintiffs ask the Court to make a factual determination that there was "part performance" sufficient to take the case out of the statute of frauds. That is not the function of the Court's discretionary jurisdiction. *See United States v. Johnston*, 268 U.S. 220, 227 (1925): "We do not

grant . . . certiorari to review evidence and discuss specific facts."

Moreover, as noted by both courts below (A18, A47), plaintiffs do not even allege part performance or reliance to their detriment. Instead, they invert the doctrine and allege that European-American partly performed to *its* detriment. As also noted by the court of appeals (A18 n.3), the facts alleged by plaintiffs do not amount to an agreement, oral or otherwise, that could be enforced by a court.

In sum, the question of "part performance" is governed by application of state law to the particular (and peculiar) facts, and the applicable state law could not more clearly preclude the claim. Thus, review on certiorari is wholly unjustified. *See Huddleston v. Dwyer*, 322 U.S. 223, 237 (1944):

"[O]rdinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts."

As they did below, plaintiffs seek also to have the Court declare that the state statute of frauds is pre-empted by a provision in a federal statute governing the loan portfolios of national banks. 12 U.S.C. § 371 (1974). European-American, however, is not a national banking association and is not subject to the provision plaintiffs cite. Moreover, that provision relates only to the amount of credit national banks may extend in connection with real estate transactions and, as noted by the court of appeals (A17-18), has no bearing on whether a writing is required for creation of an enforceable contract.

Conclusion

For the reasons stated, the petition for certiorari should be denied insofar as it seeks review of the court of appeals' application of the statute of frauds.

Respectfully submitted,

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